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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 45

COMMONWEALTH OF PENNSYLVANIA, EX REL. STEPHEN J. HERMAN, PETITIONER,

vs.

DR. JOHN W. CLAUDY, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, WESTERN DISTRICT

PETITION FOR CERTIORARI FILED JANUARY 3, 1955

CERTIORARI GRANTED APRIL 11, 1955

SUPREME COURT OF THE UNITED STATES

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1 In the Court of Common Pleas of Washington County Pennsylvania

PETITION FOR WRIT OF HABEAS-CORPUS

To the Honorable, the Judges of said Court:

The Petition of Stephen J. Herman respectfully represents:

1. That he is unjustly confined and detained by the Warden of Western States Penitentiary by reason of commitments of the Court of Quarter Sessions of Washington County, Pennsylvania at Nos. 56 to 63, both inclusive, November Sessions, 1945.

2. That the sentences in the above mentioned cases were imposed by the said court on October 26, 1945, by His Honor Carl E. Gibson, Presiding Judge, and are as follows:

No. 56 November Sessions, 1945—Burglary and Larceny 2½—5 years—Concurrent with sentence at No. 57 November Sessions, 1945.

No. 57 November Sessions, 1945—Burglary and Larceny 1st count—2½—5 years—To take effect at expiration of sentence at No. 62 November Sessions, 1945.

2nd count—2½—5 years—To take effect at expiration of sentence on first count of this number.

2 3rd count—2½—5 years—Concurrent with second count at this number.

No. 58 November Sessions, 1945—Forgery and False Pretense:

1st count—2½—5 years—Concurrent with sentence at No. 57 November Sessions, 1945.

2nd count—2½ years—Concurrent with sentence at No. 57 November Sessions, 1945.

No. 59 November Sessions, 1945—Forgery.

7 counts—2½—5 years—to run concurrently at the expiration of sentence at No. 57 November Sessions, 1945.

No. 60 November Sessions, 1945—Burglary and Larceny.

1st count—2½—5 years—Concurrent with sentence at No. 57 November Sessions, 1945.

2nd count—2½—5 years—Concurrent with sentence at No. 57 November Sessions, 1945.

No. 61 November Sessions, 1945—Larceny.

1st count—2½—5 years. To take effect as of September 5, 1945.

2nd count—2½—5 years—To take effect at expiration of sentence on 1st count of this indictment.

3rd count—2½—5 years. To take effect at expiration of sentence on 2nd count of this indictment.

3 No. 62 November Sessions, 1945—Burglary and Larceny—2½—5 years—To take effect at expiration of sentence at No. 61 November Sessions, 1945.

No. 63 November Sessions, 1945—Burglary and Larceny. 1st count—2½—5 years—Concurrent with sentence at No. 57 November Sessions, 1945.

2nd count—2½—5 years—Concurrent with sentence at No. 57 November Sessions, 1945.

The said sentences impose upon Defendant a total imprisonment of a minimum of 17½ years, expiring March 8, 1963, and a maximum of 35 years, expiring September 8, 1980.

3. That Relator is unjustly confined and imprisoned as a result of having been deprived of his constitutional rights in the proceedings prior to commitment and that said detention is in violation of due process of law.

4. That said deprivation of due process of law resulted, inter alia, from the fact that relator was not represented by counsel in the proceedings by virtue of which he is presently detained.

5. That under the circumstances of the case, Relator's representation by counsel was a necessary ingredient of due process, such circumstances being as follows:

(a) At the time of sentence, Relator was 21 years of age and of limited educational background, having com-
4 pleted only six years of elementary school.

(b) At no time during the period between arrest and sentence did Relator receive the advice, support and assistance of relatives or friends.

(c) Relator's previous experience in criminal court had been confined to the entering of pleas of guilty in 1943 to charges of Burglary, Larceny and Forgery, for which offenses he received a sentence of 6-12 months in the County Jail. Despite this previous experience, Relator had no knowledge of formal criminal proceedings, since the way in which the 1943 plea and sentence was handled was substantially the same as the instant cases.

(d) Relator did not know that he had a right to be represented by court-appointed counsel and was never so advised by the court, the prosecuting attorney, or any other court official.

(e) Relator was not asked to waive, and did not in fact, waive the appointment of counsel.

(f) The charges against Relator, though contained in eight indictments, in fact involved 27 separate offenses, under which

the maximum possible sentences would total 115 years in the penitentiary.

(g) Relator at no time knew nor was he advised of the severity of the sentences which might be imposed under the within indictments.

6. That the pleas of guilty in the above mentioned cases are invalid by reason of the failure to provide Relator with counsel, since the lack of representation actively operated to produce an ingredient of unfairness in the process which resulted in Relator's confinement.

7. That the want of counsel operated specifically to the prejudice of Relator in that competent counsel would have been able to take advantage of the following defects in the procedure prior to and at the time of sentence:

(a) The entry of plea and waiver of submission to the Grand Jury signed by Relator on September 8, 1945, authorized the preparation of three District Attorney's Bills of Indictments only—i.e., for burglary, forgery and larceny of an automobile.

(b) The indictments at Nos. 56, 57, 59, 60, 61 and 63 November Sessions, 1945, were all objectionable prior to trial on the ground of misjoinder, since in each of these indictments Defendant was charged with several separate and distinct felonies, committed at different times and involving separate circumstances.

(c) The indictment at No. 58 November Sessions, 1945, charges Defendant in the first count with forging and uttering a check, to the prejudice of one Jacob Wilner. The second count, charging Defendant with False Pretense, arises out of the same facts, yet separate sentences were imposed on each count. Moreover, the evidence of the Commonwealth, as set forth in the plea notes, would sustain only an attempt to obtain money by false pretense.

(d) Several of the offenses charged were cognizable exclusively in the Court of Over & Terminer, yet it appears from the record of the plea that all cases were disposed of in the Court of Quarter Sessions.

(e) The indictment at No. 59 November Sessions, 1945, involved seven separate and distinct charges of forgery, all of them arising out of Defendant's having signed his wife's name to certain checks written on her bank account. No layman is competent to determine whether the signing of the wife's name amounted to the offense of forgery, since in addition to the fact of signing such factors are involved as whether the rights of others were prejudiced, the necessary intent to defraud existed, the funds in the bank account were the sole

and separate property of the wife, and the authority of Defendant to act as agent for his wife. Failure to raise any of these points resulted in sentences of 2½ to 5 years on each separate count, although in fact the bank honored all of the checks and no loss was sustained by any third person.

(f) The presence of counsel would have prevented the situation which arose on October 26, 1945, when Relator was brought before the court for sentence. At this time, the Assistant District Attorney, Frank J. Doektor demanded that Defendant sign pleas to all eight indictments and when Defendant asked what he was signing the reply was "Sign your name and forget it." Relator avers that it was not until January of 1946 that he learned specifically what offenses he had pleaded guilty to, as a result of an inquiry directed to His Honor Judge Gibson.

8. That Relator was further deprived of his constitutional rights in the following respects:

(a) Following his arrest, Relator was held incommunicado for 72 hours, part of the time in the Women's Quarters in the County Jail.

(b) Relator was questioned off and on over this 72-hour period by the State Police and during the questioning the safety of his wife and daughter were threatened.

(c) At one stage in the questioning, Relator was assaulted by State Trooper H. M. Jaynes, who grabbed him by the neck and threatened to choke him if he did not confess.

(d) The so-called "confession" which afforded the basis for the preparation of District Attorney's bills was obtained as a result of threats and violence and was, in fact, untrue as to most of the charges.

(e) When Relator was brought before the Justice of the Peace he inquired as to the charges against him but he was not given this information.

9. That on the basis of the violations of his constitutional rights as set forth herein, Relator is entitled to the issuance of a writ of habeas corpus and further is entitled to be discharged from custody.

10. That Relator is guilty only of the offense charged in the first count at No. 58 November Sessions, 1945 and is not guilty of any other offenses charged against him.

11. That Relator requests permission to be present in court for a hearing and to produce witnesses on his own behalf, for the purpose of proving the following:

(a) That he was, in fact, ignorant of his rights in respect to the appointment of counsel to represent him; that he did not waive the same and that he was, in fact, prejudiced thereby.

(b) That he was not informed of the nature and severity of the crimes with which he was charged.

(c) The factual matters set forth in Paragraph 8 hereof.

(d) Any other matters of fact relevant to this Petition.

12. That the only previous application for a writ of habeas corpus was that made to this Honorable Court in May of 1952, which Petition was not accepted by this court by reason of the fact that it was submitted in forma pauperis and no filing fee was paid.

9 Wherefore, the Petitioner prays that a writ of habeas corpus be granted and awarded for his relief, under the seal of the said Court of Quarter Sessions of Washington County, Pennsylvania, directed to the said John W. Claudy, commanding him to have the body of the Petitioner before this Honorable Court immediately, to do, submit and receive whatsoever this court may consider right in that behalf, and likewise to certify specifically and fully the true causes of his commitment and detainer and when he was committed.

And he will ever pray.

STEPHEN J. HERMAN.

(Affidavit of Stephen J. Herman)

10 IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

ANSWER OF THE DISTRICT ATTORNEY OF WASHINGTON COUNTY, PENNSYLVANIA, TO PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Carl E. Gibson, Judge of the Court of Common Pleas of Washington County, Pennsylvania.

And now, comes Wray G. Zelt, District Attorney of Washington County, Pennsylvania, and makes answer to the petition for writ of habeas corpus filed, and states as follows:

1. In answer to the allegations of paragraph one it is denied that the petitioner is unjustly confined and detained by the Warden of Western State Penitentiary by reasons of commitment of the Court of Quarter Sessions of Washington County, Pennsylvania at Nos. 56 to 63 inclusive, November Sessions, 1945. On the contrary it is stated that the petitioner is lawfully confined in accordance with

sentences that are legal and in accordance with the laws of the Commonwealth of Pennsylvania.

2. The allegations in paragraph two are admitted.

3. In answer to the allegations of this paragraph, the District Attorney avers that said commitment and detention was not in violation of his constitutional rights and that due process of law was given to this petitioner.

4. In answer to the allegation that due process of law was deprived this petitioner because he had no counsel, the District Attorney avers that no request was made by said petitioner to the Court to have counsel appointed for him, therefore there is no violation of due process of law.

5. In answer to the allegations of paragraph five:

a. It is immaterial that the petitioner was 21 years old and of limited educational background. No violation of due process of law was violated.

b. It is not a necessary ingredient of due process of law that a defendant should receive the advice, support and assistance of relatives or friends. There is nothing in the record to indicate that this opportunity was denied to this petitioner.

c. The petitioner having been in Court before and having some experience with criminal procedure cannot now allege that his lack of criminal experience is a violation of due process of law.

d. There is no requirement of law that a defendant has a right to have the Court appoint counsel for him. There is also no constitutional right that a defendant be informed by the Court or prosecuting attorney that he has a right to have counsel appointed for him.

e. There is no requirement in law that the defendant be asked if he desires to waive his right to have counsel or have the Court appoint one for him.

f. The facts in this paragraph are admitted.

g. There is no rule which requires the Court or the District Attorney to advise the defendant of the severity of the sentences which may be imposed by the Court. This petitioner having been in trouble before, knew or had some knowledge of the severity of the crimes charged against him.

6. The allegations in this paragraph are denied. Nowhere in his petition does the petitioner allege unfairness of the Court.

7. It is denied that the failure of petitioner to have counsel operated to the detriment of the rights of this petitioner:

a. The petitioner having entered his plea of guilty and having waived the submission of the indictment to the Grand Jury,

under the Act of 1907, P. L. 62, cannot now object to any defects of procedure.

b. Having entered his plea of guilty and waiving the submission of the indictment to a Grand Jury, the defects if any are cured and objections cannot be raised at this time.

c. Having entered his plea of guilty and waiving the submission of the indictment to a Grand Jury, the defects if
13 any are cured and objections cannot be raised at this time.

d. The petitioner having entered his plea of guilty and having waived the submission of the indictment to the Grand Jury cannot now state that the Commonwealth did not have sufficient evidence to prove the crime charged.

e. The matters raised are questions of fact which cannot be considered after plea and sentence. If the petitioner was of the opinion that he did not sign the name of his wife, he should not plead as he did. Nowhere does the defendant deny that he signed his wife's signature to the check.

f. It is denied that the statements were made by the Assistant District Attorney in order to obtain pleas to the charges involved. This does not appear in the record.

8. a. It is denied that the relator's constitutional rights were denied because he was arrested and confined for a period of seventy-two hours. This is not an unreasonable length of time to hold a defendant. It was necessary for the police officers to make a complete investigation in view of the fact that so many crimes were committed by the relator.

b. It is denied that the officers threatened the safety of the wife and daughter of this relator. The District Attorney's Office has questioned the officers involved and have ex-
14 amined the records of the State Police and state that the charges are untrue and is amazed that counsel for relator has injected this in the petition.

c. It is denied that officer H. M. Jaynes assaulted this relator. It is alleged that if this statement were true, petitioner should have notified the Court of this fact at the time of sentence. Failure to do so convinces the District Attorney that this statement is false.

d. It is denied that a confession was obtained as a result of threats and violence. On the contrary it is alleged by the District Attorney that the confession was voluntarily obtained and failure of defendant to notify the Court of the fact at the time sentence was imposed clearly indicates that this charge is false and untrue.

e. The allegation that the Justice of the Peace failed to inform this defendant of the charges is denied. The defendant

failed to advise the Court at the time he was sentenced of, this fact clearly indicates that this statement is false and untrue.

9. It is again denied that the constitutional rights of the relator were violated. On the contrary, the relator's rights were protected by the Court and the District Attorney; therefore there is no basis for being entitled to be discharged from custody.

10. The allegations that the defendant is only guilty of the charge at No. 58 November Sessions, 1945 is denied. The defendant having an opportunity to inquire into the charges at the time of sentences, did so, and never at that time denied the commission of the other charges.

11. The District Attorney states that it would be a waste of time and very expensive for Washington County to have this defendant go into a hearing to prove charges that he could have raised at the time he was sentenced by this Court.

The District Attorney wishes to state that the question of laches arises even in an application for a Writ of Habeas Corpus and may require a refusal to issue the writ.

The Writ of Habeas Corpus should be dismissed for the reasons above assigned.

Respectfully submitted,

JOHN F. RONEY,
Assistant District Attorney.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

ANSWER OF ACTING WARDEN TO PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable, the Judges of said Court:

And now comes James F. Maroney, Acting Warden of the Western State Penitentiary, successor to Doctor John W. Claudy, Warden, respondent above named, and admits that Stephen J. Herman is being confined and restrained of his liberty in the Western State Penitentiary, but in answer hereto states as follows:

First: That the said Stephen J. Herman was received at the Western State Penitentiary on November 9, 1945 under sentences imposed on October 26, 1945 by Honorable Carl E. Gibson in the Court of Quarter Sessions of Washington County as follows:

A. No. 61 November Term, 1945: 1st Count—Larceny—2½ to 5 yrs. 2nd Count—Larceny—2½ to 5 yrs. 3rd Count—Larceny—2½ to 5 yrs., to be served consecutively.

No. 62 November Term 1945: Burglary and Larceny—2½ to 5 yrs. To begin at the expiration of sentence imposed on 3rd Count, No. 61 November Term 1945.

No. 57 November Term 1945. 1st Count—Burglary and Larceny—2½ to 5 yrs. 2nd Count—Burglary and
17 Larceny—2½ to 5 yrs., to be served consecutively with sentence imposed at No. 62 November Term 1945.

No. 57 November Term 1945: 3rd Count—Burglary and Larceny—2½ to 5 yrs., to be served concurrently with sentence imposed at No. 57 November Term 1945—2nd Count.

No. 59 November Term 1945—Forgery (7 counts)—7 concurrent sentences of 2½ to 5 yrs., each to be served consecutively with sentence imposed at No. 57 November Term 1945.

No. 60 November Term 1945—Burglary and Larceny and Burglary—1st Count 2½ yrs. to 5 yrs; No. 60 November Term 1945—Burglary and Larceny and Burglary—2nd Count 2½ to 5 yrs.

No. 63 November Term 1945—Burglary and Larceny—1st Count 2½ to 5 yrs., No. 63 November Term 1945—Burglary and Larceny—2nd Count 2½ to 5 yrs., to be served concurrently with sentences imposed at No. 57 November Term 1945.

No. 58 November Term 1945—Forgery, False Pretense—1st Count 2½ to 5 yrs., No. 58 November Term 1945—Forgery, False Pretense—2nd Count 2½ to 5 yrs., to be served concurrently with sentence imposed at No. 57 November Term 1945.

Second: In accordance with the provisions of an Act of Assembly
18 approved June 25, 1937, P. L. 2093, the sentences were computed and entered on the records of the Western State Penitentiary as not less than 17½ years nor more than 35 years, the minimum of which will expire on March 8, 1963, and the maximum on September 8, 1980.

So answers.

JAMES F. MAHONEY,
Acting Warden.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY
PENNSYLVANIA

PLEA OF DEFENDANT AND SENTENCE OF THE COURT

Plea of Defendant before the Honorable Carl E. Gibson, P. J. Friday, October 26, 1945, at 11:10 o'clock, a.m.

Appearances:

F. J. Docktor Esq., Assistant District Attorney, represents the Commonwealth.

No appearance for the defendant.

The defendant, Stephen J. Herman, stands at bar.

By Mr. Docktor:

If it please Your Honor, Stephen J. Herman, of Washington, is entering his plea of guilty to various indictments and counts drawn from No. 56 November Term to No. 63 November Term; inclusive, for the following offences. I will try to take them in chronological order.

At No. 61 November Term, 1945, this defendant is charged with larceny involving three counts; the first, of an automobile—1939 Ford truck belonging to the Union Transfer Company of Waynesburg, where he stole, unlawfully took it at West Brownsville, in Washington County, the value of said automobile being $950.00. That took place on May 26th of this year. The second count in the same indictment at No. 61 November Term charges him with larceny at West Brownsville, on August 5th of this year, of the 1941 Chevrolet Convertible automobile, bearing West Virginia registration plates, the property of Charles F. Sealay, of 613 Glove Avenue, Morgantown, West Virginia. This automobile was taken at West Brownsville, Washington County. The third count in the same indictment at No. 61 November Term charges this defendant with stealing another automobile Sunday, March 21st of this year, being a 1940 two-door Sedan, the property of Gibson Longden of Dunns Station, the value of $1,000.00.

At No. 62 November Term, 1945, Stephen J. Herman is entering his plea of guilty to a charge of burglary and larceny. This involves the breaking and entering into, on March 21st of 1945, the Saint Patrick's Church, 216 Greenside Avenue, in Canonsburg, where he gained entrance through a rear window and broke into two poor boxes, and from the one he stole approximately $20.00 in cash, and approximately $8.00 in cash from the other box. He made his getaway, after he completed this burglary and larceny, in a car

that was stolen in Canonsburg. That was the one that I referred to in the other indictment—the first one.

At No. 57 November Term, 1945, the indictment charges this defendant with burglary and larceny. It is a three-count indictment. The defendant is pleading guilty to all counts. The first involves the offense on May 26, 1945, when—that is wrong. The first involves the offense on May 3rd.

By the COURT:

What number are you on?

By Mr. DOCKTOR:

No. 57—on May 3, 1945, when he entered Carmel's Beer Place 330 West Chestnut Street, Washington, by a rear window. He broke into a music box and pin-ball machine, and stole approximately $20.00 in cash. The second count at No. 57 November Term charges that this defendant, on April 15, 1945, entered the same place, Carmel's Beer Place, 330 West Chestnut Street, Washington. He gained entrance through a rear window and broke into a pin ball machine and music box and cash register, and stole $98.18 and some chewing gum. In the third count at No. 57 November Term, on May 10, 1945, he gained entrance into Carmel's Beer Parlor, 330 West Chestnut Street, broke into a pin ball machine, music box, and got approximately $20.00 in cash. On this trip the owner heard him inside. He was upstairs in the apartment. He opened the front door and observed the accused inside, and then this defendant ran out the rear door, and was chased for a distance of several blocks. He was identified by the owner at the time of this defendant's arrest.

At No. 60 November Term, 1945, there is a two-count indictment against this defendant, charging him with burglary and larceny. The first count charges that on May 3, 1945, he entered the Washington Theater on Main Street, in Washington.

By the COURT:

Where?

By Mr. DOCKTOR:

Washington Theater, Main Street, in Washington, by forcing the side door, and then breaking into a candy machine and stealing approximately 15c in money, and forced the

office door and stole an empty money bag and some money wrappers. The second count in the indictment at No. 60 November Term charges that on May 10, 1945, he entered the Washington Theater on Main Street, Washington, by forcing the side door. He broke into the candy machine and forced the door—the office door, but did not get any loot at this time.

At No. 63 November Term, 1945, an indictment charges burglary and larceny—two-count indictment.

By the COURT:

What number is that?

22 By Mr. DOCKTOR:

No. 63, two-count indictment of burglary and larceny. The first count, on May 26, 1945, he entered the Northside Restaurant at Fredericktown. He gained entrance through a rear window and broke into a music box and pin ball machine, and stole approximately $30.00 in money. On this night, he stole the Union Transit Company truck and made his getaway. That is one of the cars involved in the larceny of motor vehicle in the first indictment I gave Your Honor.

In the second count at No. 63 November Term, this defendant, sometime on June 15, 1945, entered the Northside Restaurant again, at Fredericktown, by forcing the rear window and breaking into the music box and pin ball machine, and stole approximately $26.00.

At No. 56 November Term, 1945, there is a two-count indictment charging this defendant with burglary and larceny. In this case, on August 5, 1945, he entered the Penn Confectionery Store and Lunch Room on Railroad Street, West Brownsville, where he gained entrance by spreading the bars on the rear window, and he received $1.50 from the cash register and some chewing gum and packages of cigarettes. He stole the West Virginia car this night to make his getaway. From this car he stole five checks already made out but not indorsed, which checks were involved in a forgery indictment of this defendant, which I will bring up later, to which he is pleading guilty.

23 At No. 58 November Term, 1945, the indictment charges this defendant with a two-count indictment—with forgery and false pretense. The first count accuses the defendant, on August 25, 1945, of forging the name of Benjamin Hoover on a check purported to be drawn by Riverside Electric Company, Duncan Avenue, Morgantown. This check was drawn on the Farmers and Merchants Bank, Morgantown, West Virginia, and was one of the five that was stolen

from the West Virginia car. Payment was stopped on this check by the owner. It is in the amount of $28.28.

The second count charges this defendant with false pretense, involving the same set of circumstances. He tried to defraud one Wilner, with whom he attempted to cash the check.

At No. 59, November Term, this defendant is entering his plea of guilty to seven counts of forgery, drawn up as separate indictments. The first, on May 26, 1945, this defendant cashed a check in the sum of $75.00, made out and endorsed by Stephen J. Herman, and cashed at the Citizens National Bank. In this case, he had forged his wife's name to the check, and it was drawn by Gladys Herman. On June 11, '45 a check in the sum of $85.00—it was made out in his wife's name. He forged his wife's name as the drawer, and also forged her name, and cashed it at the Citizens National Bank. On June 3, 1945, the check in the sum of $15.00—the same thing. He forged his wife's name and cashed it at the R. E. 24 Krause Drugstore at Washington. On June 25, 1945, a check in the sum of $12.00—he also forged his wife's name and cashed this check at the Krause Drugstore on June 30, 1945; a check in the sum of $45.00, to which he forged his wife's name and cashed it at the Krause Drugstore; and July 20, 1945, a check in the sum of $50.10, to which he had forged his wife's name and cashed at the Citizens National Bank; and August 1st, a check in the sum of $40.00, to which he forged his wife's name and cashed the same at the Krause Drugstore.

Now, this defendant, Your Honor, was before this Court in 1943 on a charge of burglary and larceny and forgery. He appeared before Your Honor on September 11, 1943, and entered his plea of guilty to these charges. He was sentenced to pay the costs, a fine of $1.00, and committed to the County Jail for a period of six to twelve months. A similar sentence was passed on the forgery count, to run concurrently with the sentence of burglary and larceny.

This defendant originally comes from West Brownsville. He was married in 1943 and came to live in Washington. He is—(Addressing the defendant) How old are you now?

By the DEFENDANT:

Twenty-one.

By Mr. DOCKTOR:

Twenty-one years of age. Is there anything you wish to state to the Court about your case?

25 By the DEFENDANT:

I throw myself——

By the COURT:

You will have to speak louder.

By the DEFENDANT:

I throw myself at the mercy of the court, Your Honor.

By Mr. DOCKTOR:

I wish to state for the record that the informations and prosecutions were made by H. M. Jaynes of the Pennsylvania State Police.

By the COURT (addressing Defendant):

Where have you worked since you were paroled?

By the DEFENDANT:

I worked at the Hazel.

By the COURT (addressing Defendant):

Have you been working all of the time since you were paroled in 1943?

By the DEFENDANT:

No, sir.

By the COURT:

1944 I believe it was, wasn't it?

By the DEFENDANT:

No, sir; I was working at the hospital, too.

By the COURT:

Sir?

By the DEFENDANT:

I was working at the hospital and Hazel.

By the COURT:

At the hospital?

By the DEFENDANT:

Yes.

26 By the COURT:

How did you come to be working at the hospital?

By the DEFENDANT:

I worked there. I was paroled for that.

By the COURT:

You are the fellow who ran away from there while you were on parole.

By the DEFENDANT:

That is right; yes, sir.

By the COURT:

Will you explain to me why the Court should extend any leniency to you?

By the DEFENDANT:

No, sir.

By the COURT:

We have trusted you twice before and you have never complied with any of the conditions that you were paroled on.

By the DEFENDANT:

I tried to.

By the COURT:

You didn't even try to.

You could have continued to work up there and you wouldn't do that. Where did you go to when you ran away from the job at the hospital?

By the DEFENDANT:

I started to work down at Hazel.

By the COURT:

You were working around this town——

By the DEFENDANT:

Yes, sir.

By the COURT:

—while the officers were searching for you?

27 By the DEFENDANT:

No.

By the COURT:

Where were you?

By the DEFENDANT:

I was here in town but not working.

By the COURT:

You secured your parole on promise of good behavior.

By the DEFENDANT:

Yes, sir.

By the COURT:

In the meantime, you have committed numerous burglaries and forgeries and various felonies?

By the DEFENDANT:

Yes, sir.

By the COURT:

Now you want the Court to have mercy. There is an end to being merciful. We did that in 1944. (Addressing Mr. Docktor) By the way, when was this defendant committed on these charges?

By Mr. DOCKTOR (Addressing Mr. Jaynes):

When did you lock him up? Eighth day of September.

By Mr. JAYNES:

That is right, eighth day of September.

By the COURT:

As to the indictment at No. 61 November Term, 1945, on the first count of the indictment the sentence of the Court is that the

defendant pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for a period of not less than 2½ years, and not exceeding 5 years.

28 As to the second count, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for a period of not less than two and one-half years, and not more than five years, to begin at the expiration of the previous sentence.

As to the third count, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for a period of not less than two and one-half years, and not more than five years, to begin at the expiration of the sentence on the second count.

On the indictment at No. 62 November Sessions of 1945, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for a period of not less than two and one-half years, and not more than five years, to begin with the expiration of the sentence on the third count at No. 61 November Sessions of 1945.

At No. 57 November Sessions, 1945, on the first count of the indictment, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half years, and not more than five years, to begin at the expiration of the sentence at No. 62 November Sessions, 1945.

29 On the second count of the indictment, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for a period of not less than two and one-half years, not more than five years, to begin at the expiration of the sentence on count No. 1 in this indictment.

On the third count of the indictment, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half years, nor more than five years, to run concurrently with the sentence on the second count.

On each of the counts in the indictment at No. 60 November Sessions of 1945, the sentence of the Court is that you pay the costs of prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half years, nor more than five years, to run concurrently with the sentence on the indictment at No. 57 November Sessions of 1945.

As to the indictment at No. 63 November Term, 1945, the sentence of the Court on each count in the indictment is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half

years, and not more than five years; to run concurrently with the sentence at No. 57 November Sessions of 1945.

30 At the indictment at No. 56 November Sessions of 1945, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half years, and not exceeding five years, to run concurrently with the sentence at No. 57 November Sessions, 1945.

As to the indictment at No. 58 November Sessions of, 1945, as to each count in the indictment, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half years, nor more than five years, to run concurrently with the sentence at No. 57 November Sessions, 1945.

As to each of the seven indictments at No. 59, November Sessions, 1945, the sentence of the Court is that you pay the costs of the prosecution, a fine of $1.00, and be imprisoned in the Western Penitentiary for not less than two and one-half years, nor exceeding five years, the sentences to run concurrently, and to begin at the expiration of the sentence imposed at No. 57 November Sessions, 1945, and other sentences running concurrently with it.

The view of the Court is, that your total sentence shall be for seventeen and one-half years minimum, and thirty-five years maximum.

31 Stenographer's Certificate to foregoing transcript omitted in printing.

The foregoing record of the proceedings upon the entering of pleas and the passing of sentence upon the defendant in the above causes is hereby approved, and directed to be filed.

CARL E. GIBSON,
Trial Judge.

32 IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

OPINION

GIBSON, *P. J.*

On September 8, 1945, H. M. Jones, a corporal of the state police, made eight criminal informations before John F. Carmichael, an alderman of the City of Washington, against the defendant, charging him with eight offenses of burglary, twelve offenses of larceny, eight offenses of forgery, and two offenses of false pretense, all alleged to have been committed between March 21, 1945, and

August 25, 1945. The record shows that on that day warrants were issued for the defendant, and on the same day he was arrested and brought before the same alderman; that he demanded a hearing on each information and a hearing was held at that time. On each information witnesses were produced and the defendant also was sworn admitting in each case the offense charged in the information, whereupon he was committed.

On October 26, 1945, the defendant was called before the court to enter his plea on the various bills charging the same offenses, and on that day he endorsed on each bill a waiver of submission of the case to the grand jury and entered a plea of guilty in open court. The matter was there presented by the assistant district attorney with the bills endorsed with the waiver and plea, of which a
33 record was taken, and the defendant was given an opportunity to make any statement he desired. It then developed that the defendant, on September 11, 1943, had been before the court on a charge of burglary and larceny and also for forgery, and that at that time he was sentenced on concurrent sentences to be imprisoned in the county jail for a period of not less than six months nor more than twelve months, and that he had been paroled from the county jail to complete his sentences and that he had violated his parole.

On certain of the charges, the defendant was sentenced to the Western Penitentiary to serve an aggregate minimum term of seventeen and one-half years and a maximum of thirty-five years. Sentences on the other charges were to run concurrently with those imposed and added no additional time.

On April 30, 1953, the defendant applied for a writ of habeas corpus, complaining that he was unjustly detained. A rule was issued on this application and an answer was filed by the acting warden of the Western Penitentiary claiming to hold the defendant under the sentences imposed.

The defendant claims:

1. That no counsel was appointed to inform him regarding the charges made in the various indictments and that he should have been supplied with counsel.

2. That counsel should have been supplied because he was not advised of the severity of the sentences which might be imposed.

34 3. That the defendant was not informed of the charges set forth in the indictments.

4. That counsel should have been appointed and he was prejudiced for lack thereof because of the including of different counts in the various indictments, and, therefore, the form of the indictments was improper.

5. That the defendant was detained after his arrest for a period of seventy-two hours during which he was questioned and threatened.

6. That the defendant is guilty only of the offense charged in the first count of the indictment at No. 58 November Sessions, 1945, which charges forgery of a check for $28.28.

7. That sentence was imposed in the wrong court.

We will take up each of these matters in their order.

The first, second and third questions raised by the petition deal with the question of appointing counsel for defendant, even though this was not requested. There was nothing unusual about the proceeding except that the petitioner had been so exceedingly active over a relatively short period that his confinement was obviously necessary for the protection of the law-abiding public. He was not a stranger in the criminal courts. He had previously been there and partially served a term for burglary and forgery.

35 It ought to be settled by this time that lack of counsel in a non-capital case denies federal constitutional protection only when the absence results in the denial to the accused of the essentials of justice: Commonwealth ex rel. Lockoski v. Claudy, 172 Superior Ct. 330; Commonwealth ex rel. Reese v. Claudy, 170 Superior Ct. 488; Commonwealth ex rel. Popovich v. Claudy, 170 Superior Ct. 482; Commonwealth ex rel. Bruce v. Burke, 170 Superior Ct. 642; Commonwealth ex rel. Reggie v. Burke, 170 Superior Ct. 647; and many authorities which might be cited.

The fourth complaint referred to relates to the including of several counts in certain indictments. This does appear, evidently because the defendant burglarized the same place several different times; he committed forgery, forging the name of another person several different times; and the district attorney may have thought that proper. Treating each count in the indictment as a separate indictment, sentences were imposd on each count, many of them running concurrently, and we do not see that the defendant has suffered anx harm by reason of the including of several counts in one indictment.

Even though the relator stood trial and two or more indictments were tried at the same time, this is a matter for the discretion of the court and cannot be raised on habeas corpus: Commonwealth ex rel. Howard v. Claudy, 172 Superior Ct. 574; Commonwealth ex rel. Haines v. Burke, 173 Superior Ct. 477.

36 The defendant's contention that he was detained after his arrest for a period of seventy-two hours during which he was questioned and threatened contradicts the record which was made at that time. In each instance the information shows that on the day the information was made and a warrant issued, the

defendant was brought before the committing magistrate and on his request received a hearing and was committed to the county jail. All of the informations were made on the same day and hearings held on that day. In any event, detention for a reasonable time before the hearing and questioning are not prohibited: Commonwealth ex rel. Roberts v. Keenan, 170 Superior Ct. 282.

If there was any questioning or detention it must have been on September 8th or previous. The petitioner was not called for sentence until October 26, 1945, which is one month and eighteen days after the date of his commitment by the committing magistrate, and while he was in open court where he entered his pleas he does not claim that he was influenced by any threats or undue influence or that he had been subjected to such during one month and eighteen days intervening between his commitment and the time he appeared in court.

The defendant now claims that he was not guilty of any but one of the offenses charged. He seeks now, almost eight years after entering his pleas and being sentenced, to show his innocence and contradict all of the records regarding the crimes in which he admitted he was involved. This is so unreasonable it requires no comment.

37 The defendant claims that sentence was imposed in the wrong court. The indictments regarding burglary which can be tried and punishment imposed only in the Court of Oyer and Terminer, do not show that they were certified to that court. However, the law provides that a judge of the Court of Common Pleas shall sit in the various courts of Quarter Sessions and Oyer and Terminer and General Gaol Delivery, and in the receiving of pleas to indictments all of the requirements of such procedure in a court of Oyer and Terminer were performed. The mere certifying of the records was a formality, and since the court has power to correct its records, the indictment charging burglary might now be certified nunc pro tunc to the Court of Oyer and Terminer, or if it be held that this was not permissible and there must be a certification of the record to the Court of Oyer and Terminer before sentence was imposed even if the same judges presided, then the petitioner has not been properly sentenced and the bills may now be certified to the Court of Oyer and Terminer and the petitioner called for re-sentence. We do not see how the petitioner can claim that he suffered any injustice by reason of the fact that the various bills of indictment on which he waived the action of the grand jury and entered pleas were not first certified to the Court of Oyer and Terminer. All of the sentences are clearly within the limits fixed by the Criminal Code. We, therefore, conclude that there is nothing which requires a hearing: Common-

Wealth ex rel. Haines v. Burke, supra; Commonwealth ex rel.
38 Lockoski v. Claudy, supra; Commonwealth ex rel. Elliott v. Baldi, 373 Pa. 489.

In the Court of Common Pleas of Washington County, Pennsylvania

ORDER DISMISSING PETITION—December 21, 1953

And now, December 21, 1953, the application of Stephen J. Herman for a writ of habeas corpus is hereby dismissed at the cost of the petitioner.

CARL E. GIBSON,
P. J.

39 In the Superior Court of Pennsylvania Sitting at Pittsburgh

[Title omitted]

DOCKET ENTRIES

Appeal from the judgment of the Court of Common Pleas of Washington County at No. 369 May Term, 1953.
January 25, 1954, Appeal and affidavit filed and writ exit, returnable second Monday of April, 1954.
January 28, 1954, Notice of Appeal, filed.
February 25, 1954, Petition in forma pauperis, filed.
February 27, 1954, Record filed.

Order

And Now, February 26, 1954, leave is granted to the appellant to furnish ten clear typewritten copies of the brief, including the opinion of the court below, and to use the original record and notes of testimony at the argument of this appeal, and to serve one clear typewritten copy of the brief, including the opinion of the court below, on opposing counsel in lieu of printing the brief and record as provided by the rules.

By the Court
CHESTER H. RHODES, *P. J.*

April 13, 1954. Argued.

DECISION

August 30, 1954. Order dismissing writ affirmed.

WOODSIDE, *J.*

September 9, 1954. Petition for allowance of appeal to
40 the Supreme Court filed at No. 1980A Miscellaneous Docket.

October 7, 1954. Remitted.

For Appellant:

MARJORIE H. MATSON.

For Appellee:

WRAY G. ZELT,
District Attorney.
JOHN F. RONEY,
Asst. District Attorney.

41 In the Superior Court of Pennsylvania, Pittsburgh District, No. 89 April Term, 1954

No. 288

COMMONWEALTH OF PENNSYLVANIA EX REL., STEPHEN J. HERMAN

v.

DR. JOHN W. CLAUDY, WARDEN OF THE WESTERN PENITENTIARY

Appeal from the Order of the Court of Common Pleas of Washington County, Pennsylvania, at No. 369 May Term, 1953.

OPINION BY WOODSIDE, *J.*—Filed: August 30, 1954

The only question presented to us by the appellant in this appeal from the refusal of the lower court to grant a writ of habeas corpus is "Under the circumstances of this case, did the failure of the Washington County Court to appoint counsel for Defendant deprive him of due process of Law?"

The matter was before the lower court on petition and answer. The court's own record of the sentence and what transpired there was also properly before it, Com. ex rel. Comer v. Claudy, 174 Pa. Superior Ct. 494, 496; 102 A. 2d 227 (1954). Since the lower court dismissed the petition without a hearing, the facts alleged in the petition, if properly and sufficiently averred and unless
42 contradicted by the record itself, must be accepted as true. The conclusions contained in it need not be.

It appears that on October 26, 1945 the relator pleaded guilty before President Judge Gibson in Washington County to 8 offenses of burglary, 12 of larceny, 8 of forgery, and 2 of false pretense, all alleged to have been committed between March 21, 1945 and August 25, 1945. He was sentenced to 2½ years to 5 years on each of the offenses, some to run consecutively, but most concurrently. His total sentence was 17½ years to 35 years in the Western Penitentiary to be computed from September 8, 1945 the day of his arrest.

The law to be applied in this case was set forth by this court in Com. ex rel. Reggie v. Burke, 170 Pa. Superior Ct. 647, 649, 90 A. 2d 585 (1952) as follows:

> "The failure to provide counsel when none is requested or to advise a defendant that counsel will be assigned him upon request does not constitute, ipso facto, a denial of due process or other violation of a defendant's constitutional rights in non-capital cases . . . (Cases cited)
>
> "Both federal and state courts have said that, to invalidate a plea of guilty in non-capital cases by reason of denial of due process arising from failure to provide a prisoner with counsel by the courts of this Commonwealth, the prisoner must establish that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement. (Cases cited) In the absence of such ingredient of unfairness, the question of waiver of the right to counsel, understandingly made, does not require consideration."

43 See also Com. ex rel. Popovich v. Claudy, 170 Pa. Superior Ct. 482, 87 A. 2d 489 (1952); Com. ex rel. Johnson v. Burke, 174 Pa. Superior Ct. 119, 100 A. 2d 425 (1953).

Whether there is "an ingredient of unfairness" is a determination to be made on the basis of the facts of the individual cases, Uveges v. Pennsylvania, 335 U. S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948).

In the recent case of Com. ex rel. Swiderkowski v. Burke, 173 Pa. Superior Ct. 363, 366, 98 A. 2d (1953) this court said:

> "Youth, lack of education, inexperience with the intricacies of criminal procedure, improper conduct on the part of the court or prosecuting officials and the complicated nature of the offense charged may, in some combination, constitute the 'ingredient of unfairness' which renders the absence of counsel at sentencing a denial of due process. Uveges v. Pennsylvania, 335 U. S. 437, 441, 69 S. Ct. 184, 93 L. Ed. 127."

Two years prior to the sentence which is the subject of the present inquiry, the defendant had been charged with burglary, larceny,

and forgery, for which offenses he was sentenced to six to twelve months in the Washington County Jail. After being paroled on this offense he violated his parole by leaving his employment and avoiding the local officials so that his whereabouts were unknown.

Appellant was arrested by the State Police in September, 1945, and held for questioning in connection with a series of burglaries and larcenies. Relator alleges that this questioning extended off and on over a period of 72 hours, during which time he was held incommunicado, part of the time in the Women's Quarters of the County Jail. He also alleges that at one stage of the questioning an officer grabbed him by the neck and threatened to choke him if he did not confess.

44 The Criminal Court records disclose that on September 8, 1945, defendant signed a form entitled "Waiver of Grand Jury and Entry of Plea", by which he agreed to enter a plea to burglary, forgery, and larceny of auto. On the same day defendant was taken before a Justice of the Peace, where he was held for court on 27 separate offenses.

From September 8, 1945 to October 26, 1945, when defendant was brought before the Court for sentence, defendant was held in the Washington County Jail.

Relator now denies his guilt except as to one charge of forgery.

A record was made of the hearing. It shows that as the defendant stood at the bar, without counsel, the assistant district attorney advised the court that defendant had entered a plea of guilty to various indictments and counts which he then referred to in order and described in some detail.

He related the theft of three motor vehicles, a burglary of St. Patrick's Church in Canonsburg, where defendant entered the rear window and stole $20 from the poor boxes; three burglaries of Carmel's Beer Place in Washington, Pa., where on one occasion he was seen, chased and identified, two burglaries of the Washington Theatre and burglaries of restaurants at Frederickstown and West Brownsville. He told how the defendant stole the motor vehicles, referred to above, to get away after committing some of the above crimes and how he stole five checks from one of them; how he forged and cashed one of these checks; and how he forged his wife's name to seven other checks.

45 It was also called to the court's attention that the defendant had been before the court in 1943 on charges of burglary, larceny, and forgery on which he was given six to twelve months in jail. His former and his present residence, and his marital status were given to the court.

He was asked his age. He was asked, "Is there anything you wished to state to the Court about your case?" and replied, "I throw myself at the mercy of the court, your Honor."

The court asked him where he had been working since he was paroled in the former case and, after the court referred to his running away from his work while he was on parole, asked him, "Will you explain to me why the court should extend any leniency to you?" The court asked him whether he had committed numerous burglaries and forgeries and various felonies and he replied, "Yes, sir." The court inquired for the day of commitment, and sentenced with care. The court's discussion of the case with the defendant is recorded over three pages of the printed record. It shows that the defendant was not only given opportunity but was encouraged to say anything to the court which he felt would be helpful to his cause. At no time did the defendant suggest that he desired counsel.

We recite these matters in some detail to show that the court made an effort to get at the facts and to give the defendant an opportunity to say whatever could be said on his behalf.

A careful reading of the record will indicate that there was no unfairness on the part of the court, or the district attorney.

46 The relator was 21 years of age. This, of course, is young, but a large percentage of those who appear in criminal courts are either in their late teens or early twenties. There are probably as many burglaries committed by persons of this boy's age, or younger, as there are by persons older than he."

He had only a grammar school education, but he had been in trouble for larceny, burglary, and forgery before. He had contact with the police, the district attorney, the court, and the probation office prior to his arrest for the offenses in question here. Furthermore, he was in jail first, for a period of some months on the previous sentence, and a second time for about seven weeks before appearing for sentence in these cases. It is not in high school and college that one learns the intricacies of criminal procedure, nor the use of legal technicalities, nor the ways of the officials who are charged with law enforcement. These things are more frequently learned in the jailhouse where there is a concentration of experience on such matters and where there is much time to recall and exchange experiences which have been so important to all present. The relator was not ignorant of the ways of the law and the courts when he was sentenced.

Technicalities, which might have been raised at the time of sentence as to the indictments and as to whether some of the cases should not have been docketed in the Court of Oyer and Terminer rather than Quarter Sessions, are not important to us in this case.

It is not our function to review the term of the sentences imposed by the courts, nor to pass upon their severity or their leniency. The relator got into serious trouble; was paroled; then violated

the trust thus placed in him; then committed a series of
47 various types of serious crimes directed against the church and his family, as well as strangers. For such conduct he should expect that the public, speaking through the sentencing judge, would be likely to express some righteous indignation in the form of a severe sentence. But the prisoner here has now served 9 years, a long time for crimes involving no violence. The Pardon Board has never been asked to examine his case. Whether or not it is because the prisoner fears his prison record or present conduct would not merit consideration, we do not know. If the case is presented to that Board it might find that his record, attitude, and conduct in the penitentiary confirm the sentencing judge's evaluation of him, and that he is not even now a proper person to have his freedom. On the other hand, it might conclude that he has served sufficient time, and is now entitled to another chance.

Under no circumstances should writs of habeas corpus be granted as substitutes for commutation of sentences.

The Constitution of this Commonwealth gives the responsibility in such matters to the Pardon Board, and we have no desire nor right to usurp it.

Order dismissing writ affirmed.

48 In the Supreme Court of Pennsylvania, Western District

[Title omitted]

No. 1980A

PETITION FOR ALLOWANCE OF APPEAL—Filed September 9, 1954

To the Honorable, the Chief Justice and the Associate Judges of Said Court:

The petition of Stephen J. Herman, Appellant by his attorney, Marjorie Hanson Matson, in the above-entitled case, respectfully represents:

First: Your petitioner filed his application for a writ of habeas corpus in the Court of Common Pleas of Washington County, Pennsylvania and a rule issued upon the District Attorney to show cause why the writ should not be granted. An answer was filed and the lower court disposed of the matter on Petition and Answers entering an order dismissing the writ.

Second: An appeal was taken to the Superior Court, which, on August 30, 1954, affirmed the order of the lower court dismissing the writ.

Third: The petition for the writ of habeas corpus and the argument on appeal in the Superior Court raised the basic question of

whether under all the circumstances the taking of an uncounselled plea of guilty to 27 separate charges deprived Petitioner of due process of law.

Fourth: Your Petitioner argued that the facts of his case brought him squarely within the holding of the Superior Court in the case of Com. ex rel. *Swieckowski* v. *Burke*, 173 Pa. Superior Court 363 (1953), in which case it was held that,

> "Youth, lack of education, inexperience with the intricacies of criminal procedure, improper conduct on the part of the court or prosecuting officials and the complicated nature of the offense charged may, in some combination, constitute the 'ingredient of unfairness' which renders the absence of counsel at sentencing a denial of due process."

49 . While the Superior Court impliedly accepted these standards, by citing and quoting from the Swieckowski case, its decision actually repudiated that case. The Court's holding on each of these factors, as applied to the instant case, was as follows:

(a) While conceding that Defendant was only 21 at the time of sentence, the court gave no weight to this fact, pointing out that "a large percentage of those who appear in criminal courts are either in their late teens or early twenties."

(b) Citing that fact that defendant had only a grammar school education, the court dismissed this factor upon the theory that Defendant's one previous jail experience, and his jail confinement for seven weeks prior to sentence, made up for the lack of educational background.

(c) The Court held that defendant's previous criminal experience had familiarized him with the intricacies of criminal procedure, despite the admitted fact that on the former occasion defendant had likewise entered a guilty plea without benefit of counsel, and his express averment that he did not know that he had a right to be represented by court-appointed counsel and was never so advised by any court official.

(d) Appellant averred that the proceedings in his case had been characterized by improper conduct on the part of the court and prosecuting officials in that (1) he was held incommunicado for 72 hours following his arrest, part of the time in the Women's Quarters of the County Jail; (2) he was subjected to "off and on" questioning during this entire period, physically abused and the safety of his wife and child threatened; (3) the so-called "confession" which afforded the basis for the preparation of District Attorney's bills of indictment was the result of the continuous questioning and of the threats and violence, and was, in fact, untrue as to most of the charges; (4) although Defendant had signed a form agreeing to plead to only 3 offenses, on the same day he was held

for court by the Justice of the Peace on 27 separate charges; (5) the court sentenced the Defendant for at least one offense which the statement of the District Attorney indicated had not been committed, and for seven charges of alleged forgery of his wife's
50 name, although the record itself indicated that no third person had been defrauded and that no case against the Defendant could have been made out. Since the court held in its opinion that, absent a hearing in the lower court, the facts properly averred in the Petition must be accepted as true except where contradicted by the Record of the original proceedings, these allegations of improper conduct must be accepted as true. Nonetheless, the Superior Court completely disregarded the improper conduct, even where the record supported the Defendant's allegations, and found no "ingredient of unfairness" present in the case.

(c) The record is clear that the charges against the Defendant were complicated and numerous, and characterized by legal technicalities with which an uncounselled Defendant was unable to cope, yet the Superior Court ignored this factor also.

Sixth: The refusal of the Superior Court to grant relief to your Petitioner had deprived him of his constitutional rights.

Seventh: The instant decision is in conflict with the Superior Court's holding in Com. ex rel. *Swieckowski* v. *Burke*, previously cited, and in view of the constitutional issues involved under both federal and state due process clauses, should be reviewed by your Honorable Court.

Wherefore, your Petitioner respectfully prays that your Honorable Court allow him to appeal from the judgment of the Superior Court in the within case.

(S.) MARJORIE HANSON MATSON
Attorney for Petitioner.

51 CERTIFICATE OF COUNSEL

COMMONWEALTH OF PENNSYLVANIA
County of Allegheny, ss:

Personally appeared before the subscriber, a Notary Public in and for said county and state, MARJORIE HANSON MATSON, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing Petition for Allowance of Appeal are true and correct, and this appeal is not taken for delay but because she believes an injustice has been done to Petitioner.

(S.) MARJORIE HANSON MATSON.

Sworn to and subscribed before me this 9th day of September, 1954.

(S.) LOTTY LOTZ.

51a

ORDER

October 6, 1954, Petition denied.

Per Curiam.

(File endorsement omitted.)

52 IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

[Title omitted]

No. 1980A Miscellaneous Docket

DOCKET ENTRIES

September 9, 1954, Petition of appellant for allowance of an appeal from the judgment of the Superior Court at No. 89 April Term, 1954, filed.

Order

October 6, 1954

Petition denied

Per Curiam.

October 7, 1954, Petition of appellant to retain record pending application to the Supreme Court of the United States for a Writ of Certiorari, filed.

Order

October 8, 1954

Petition granted

Per Curiam.

December 18, 1954, Praecipe for certification of record to Supreme Court of the United States, filed.

For Appellant:

MARJORIE HANSON MATSON.

53-54 Praecipe for Record—Filed December 18, 1954

(Omitted in printing)

55 Judge's and Clerk's Certificates to foregoing transcript omitted in printing.

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56 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954
No. 399 Misc.

COMMONWEALTH OF PENNSYLVANIA EX REL. STEPHEN J. HERMAN, PETITIONER,

vs.

DR. JOHN W. CLAUDY, WARDEN

On petition for writ of Certiorari to the Supreme Court of the State of Commonwealth of Pennsylvania, Western District.

ORDER ALLOWING CERTIORARI—April 11, 1955

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket, as No. 713.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1955 55476-2 161

SUPREME COURT U.S.

Office Supreme Court, U. S.
FILED
SEP 19 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 45

COMMONWEALTH OF PENNSYLVANIA, EX REL. STEPHEN J. HERMAN, PETITIONER

vs.

DR. JOHN W. CLAUDY, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF OF PETITIONER

HERBERT MONTE LEVY,
% American Civil Liberties Union,
170 Fifth Ave.,
New York, N. Y.,
MARJORIE HANSON MATSON,
Law and Finance Building,
Pittsburgh, Pennsylvania,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 45

COMMONWEALTH OF PENNSYLVANIA, EX REL. STEPHEN J. HERMAN, PETITIONER

vs.

DR. JOHN W. CLAUDY, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Common Pleas of Washington County, Pennsylvania, which appears in the Transcript of Record at pages 18 to 22,[1] was not reported. The opinion of the Superior Court of the Commonwealth of Pennsylvania (Tr. 23-27) is reported at 176 Pa. Super. 387 (1954),

[1] Pages in the Transcript of Record are hereinafter referred to as (Tr. —).

107 A. 2d 595. The Supreme Court of Pennsylvania did not deliver any opinion.

Jurisdiction

Jurisdiction rests on 28 U.S.C. Sec. 1257(3) and 2254. The order sought to be reviewed—a denial by the Supreme Court of Pennsylvania of a petition for leave to appeal from the judgment of the Superior Court of Pennsylvania—was dated and entered October 6, 1954. Petition for certiorari was filed in this Court on January 3, 1955. Certiorari was granted on April 11, 1955 (348 U.S. 964).

Constitutional Provision Involved

United States Constitution, Article XIV, Section 1: "... nor shall any State deprive any person of liberty ... without due process of law."

Questions Presented for Review

(i) Whether a writ of habeas corpus may be denied consistently with the Fourteenth Amendment to the U.S. Constitution in a case in which a defendant has been sentenced to a state penitentiary following the entry of a plea of guilty when defendant confessed to the charges on which he was sentenced only after having been held incommunicado for a period of 72 hours, during which period defendant was questioned intermittently and subjected to threats (both to himself and to his family), physical abuse and mistreatment.

(ii) Whether a writ of habeas corpus may be denied consistently with the Fourteenth Amendment to the U.S. Constitution when defendant signed Waivers of Grand Jury proceedings and Pleas to 8 indictments containing 27 separate counts, carrying a maximum sentence of 315 years, and (1) defendant was refused information as to the indictments; (2) he was not advised of his right to

counsel; (3) he had no knowledge of his right to have court-appointed counsel; and (4) the number and nature of the offenses charged against him were such as to make it impossible for a 21-year old defendant with only 6 years of formal education and limited previous criminal experience to handle the case without benefit of counsel.

Statement of the Case

Petitioner Stephen Herman filed a petition for a writ of habeas corpus in the Court of Common Pleas of Washington County, Pennsylvania, alleging that pleas of guilty pursuant to which he was being held in a penitentiary were obtained pursuant to threats and that he had been denied his right to counsel, in violation of due process of law. (Tr. 1-5) Though an answer was filed by the District Attorney, representing the Respondent (Tr. 5-8), the case was disposed of without a hearing. Under Pennsylvania law, no hearing having been held, the averments of the petitioner must be accepted as true except to the extent that they are contradicted by the record (Tr. 23). The following statement of facts, therefore, is taken from statements made in the petition and supporting documents.

Stephen Herman was arrested by the state police in September 1945 (Tr. 18-19), and held for questioning over a period of 72 hours, a portion of which time he spent in the women's quarters of the county jail. He was held incommunicado during this three day period, subjected to intermittent questioning about a series of burglaries and robberies. He was physically assaulted by police officers. Not only his safety, but that of his wife and children were threatened. At one point in the interrogation, a police officer grabbed him by the throat and threatened to choke him if he did not confess. As a result of incommunicado detention and the threats and abuse, defendant finally "con-

fessed" to a series of offenses, signing a form entitled Waiver of Grand Jury and Entry of Plea by which he agreed to plead guilty to three indictment charges of burglary, forgery and larceny of an automobile. (Tr. 4). The same day he was taken before a justice of the peace where he was held for court for 27 separate offenses (Tr. 19).[2]

Prior to the trial, while defendant was held in the Washington County Jail (September 8, 1945 to October 26, 1945) no relative or friend appeared to give him advice, support or assistance (Tr. 2). Since the indictment at No. 59 November Sessions 1945 represented forgery charges made against him by his wife (Tr. 13), it is apparent that his family had turned against him. Brought before the court for sentence on October 26, 1945, petitioner was directed by the Assistant District Attorney to sign pleas to 8 indictments; when he inquired as to what he was signing, he was told by the District Attorney, "Sign your name and forget it." (Tr. 4).

There were 27 different charges in the indictments against petitioner, carrying a maximum of 315 years (Tr. 2-3). Petitioner at the time of the entry of his guilty plea was 21 years of age. His only education was 6 years of elementary school. His only previous criminal experience was in 1943 when he had pleaded guilty—without benefit of counsel—to charges of burglary, larceny and forgery and had been sentenced to 6-12 months in the county

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[2] Even now there is confusion in the record as to how many charges there were against petitioner. He alleged that there were 27 charges against him (Tr. 2); the sentences he recites are for 21 offenses (Tr. 1-2); the District Attorney's answer admits both allegations (Tr. 6); the trial minutes show there were 21 offenses charged (Tr. 10-13); the courts of Pennsylvania state that there were 30 offenses charged (Tr. 18, 24). Though less advantageous to our case than the figure of 30, we shall stipulate for purposes of the proceedings in this Court that there were 27 offenses, the theory on which the petition for certiorari was drafted, at which time these discrepancies had not been noted.

jail (Tr. 2). Petitioner was unfamiliar with formal courtroom procedure, did not know that he had a right to be represented by court-appointed counsel, was never so advised by the court, the prosecuting attorney or any other court officials, nor was he asked to waive nor did he waive appointment of counsel. (Tr. 2). Nor was petitioner informed by anyone that by signing the pleas he was pleading guilty to indictments that carry a maximum sentence of 315 years. (Tr. 3). He did not even learn until January 1946, when he wrote to the trial judge inquiring as to the offenses for which he had been sentenced, specifically what offenses he had pleaded guilty to (Tr. 4).

The Pennsylvania courts have denied habeas corpus.

Summary of Argument

1. The procurement of a plea of guilty through protracted questioning for three days during which defendant was held incommunicado and he and his family threatened, together with physical abuse, requires that the conviction be invalidated. Not only does a coerced confession have a continuing effect, but surely the coercion of a plea of guilty at the time of entry of plea and sentence invalidates conviction based thereon. Moreover, the action of the District Attorney in refusing an uncounselled defendant information as to what he is signing when he is in effect making a guilty plea, amounts to a procurement of a plea of guilty by trickery in violation of due process of law.

2. To have each right-to-counsel case decided upon its own facts puts an extreme burden upon this Court. While it is appreciated that no rule of thumb can be made, we urge that even in non-capital cases counsel must be appointed where a person faces a life sentence without possibility of parole. Such a rule, in addition to being just and in accordance with a strict interpretation of due process of law, will help to ease the administration of justice.

3. Under the facts of the case, the failure to advise petitioner that he had a right to have counsel represent him at the expense of the state amounts to a violation of due process of law, considering the defendant's youth, lack of education, the threats of the prosecution, and the failure of the court to perform the functions ordinarily entrusted to counsel by advising defendant of the consequences of his guilty plea.

4. All members of this Court who have previously spoken on right to counsel questions are not in agreement as to what the right to counsel entails. Some Justices believe that in every state trial involving a serious offense, counsel must be appointed; others believe that in non-capital state cases, each case must depend upon its own facts. Whichever of these tests is applied here, prior precedent clearly requires that the conviction here be upset.

5. Petitioner's conviction must be vacated under any of the four theories of the case set forth above, certainly on the basis of all together.

Argument

I. SINCE DEFENDANT'S CONFESSION WAS PROCURED BY ILLEGAL DETENTION, PROTRACTED QUESTIONING OVER A PERIOD OF 72 HOURS, THREATS TO HIMSELF AND FAMILY, AND PHYSICAL ABUSE, HIS CONVICTION MUST BE UPSET.

Under the decisions of this Court in *Watts* v. *Indiana*, 338 U.S. 49 (1949), *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949), and *Harris* v. *South Carolina*, 338 U.S. 68 (1949), there is no doubt but that illegal detention, coercive questioning and physical abuse and mistreatment invalidates a confession secured thereby. Allegations in a Petition for Habeas Corpus that these factors are present here require that a hearing be held to determine the facts, as in any case where a deprivation of constitutional rights is

properly averred in the petition and the record itself fails to rebut the averments. *Palmer v. Ashe*, 342 U.S. 134 (1951).

In the case at bar, a rule to show cause why the writ should not be issued was granted, and an answer filed. Factual issues were raised by the answer, and accordingly, a hearing was required by the decisions of this Court. Nonetheless, the Superior and Supreme Courts of Pennsylvania refused the relief sought.

In its opinion, the Superior Court referred to Petitioner's contentions re illegal detention, extensive questioning, threats and physical abuse (Tr. 25), but expressed no opinion as to whether these facts, if true, amounted to a denial of due process or required a hearing. No attempt was made to reconcile this evasion of the constitutional problem with the previous holdings of this Court.

It might be contended that an agreement to plead guilty based upon the 72 hour illegal period of detention and events occurring during such time would not necessarily carry over into petitioner's plea of guilty some days later. Had the effect of coercion carried over to the time of plea, it surely would have rendered the plea invalid. Cf. *Leyra* v. *Denno*, 347 U.S. 556 (1954). Whether it so carried over, or whether the guilty plea was voluntary, was a question of fact which could be determined only after hearing. But a hearing was denied. Only a hearing could establish whether Herman, at plea time, felt that he was bound by his previous confession and the paper he signed agreeing to enter a guilty plea. But in any event, the action of the Assistant District Attorney at the time of entry of plea in telling the defendant to sign his name to the paper and forget it, even standing by itself, would be enough to vitiate the conviction. *Smith* v. *O'Grady*, 312 U.S. 329 (1941) [state case]; *Walker* v. *Johnston*, 312

U.S. 275 (1941) [federal prosecution, but citing a state case—*Mooney* v. *Holohan*, 294 U.S. 103 (1935)—in support]; cf. *Von Moltke* v. *Gillies*, 332 U.S. 708, 710 (1948) (federal prosecution).

The propositions advanced under this portion of the argument seem so elementary to us that they deserve no extended analysis in this brief. What is surprising is the failure of the appellate courts of Pennsylvania to pass upon the question of whether illegal detention, extensive questioning, threats and physical abuse constitute a deprivation of due process of law. This is understandable solely in the light of the evasions of the holding of the *Watts*, *Turner* and *Harris* cases, cited *supra*, p. 6, which has characterized recent Pennsylvania decisions, the Intermediate Appellate Court of which has held it is bound by its own state court decisions in matters involving the United States Constitution rather than the decisions of the United States Supreme Court. *Commonwealth* v. *Friday*, 171 Pa. Super. 397, 404, 90 A. 2d 856, 859 (1952).[3]

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[3] "Whatever be the impact of the opinions of the United States Supreme Court, this court is bound by the decisions of the Supreme Court of Pennsylvania which has provided the controlling authority in a recent case, *Commonwealth* vs. *Shupp*, 365 Pa. 439, 446, 448, 75 A. 2d 587, 590." Based upon its interpretation of the effect to be given to the *Shupp* case, the Superior Court rejected defendant's contention in the *Friday* case, on an appeal from a conviction for Attempted Rape, that the confession used against him was obtained in violation of his constitutional rights as defined in the *Watts* and *Turner* cases.

In the *Shupp* case, the defendant had been held for 15 *days* without a preliminary hearing, during which period he was frequently questioned by the authorities, and was refused counsel. The Pennsylvania Supreme Court held that the delay in holding the hearing was immaterial, that long interrogation is not *per se* unfair, and that interrogation may lawfully be continued until the defendant confesses, unless mental coercion or duress is shown. In so holding the Court relied heavily upon *Commonwealth* v. *Agoston*, 364 Pa. 464, 72 A. 2d 575 (1950), cert. den. 340 U.S. 844, wherein Chief Justice Maxey upheld the use of a confession secured after intermittent questioning during a four day period, during which time defendant was not given a preliminary hearing, and had no counsel. In pointing out the reasons why police officers should be per-

While we realize the delicate nature of state-federal relationships, apparently the courts of Pennsylvania have failed to follow a simple and clear statement of the law laid down by this Court in reference to matters involving coercion of confessions and guilty pleas.

II. (A) FAILURE TO ADVISE A DEFENDANT OF HIS RIGHT TO COURT-APPOINTED COUNSEL, IN A CASE IN WHICH HE FACES A POSSIBILITY OF A LIFE SENTENCE WITHOUT PAROLE, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

(B) IN ANY EVENT, THE JUDGMENT BELOW MUST BE REVERSED SINCE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW IN THAT (1) HE WAS REFUSED INFORMATION AS TO THE INDICTMENTS AGAINST HIM; (2) HE WAS NOT ADVISED, NOR DID HE HAVE KNOWLEDGE OF, HIS RIGHT TO HAVE COURT-APPOINTED COUNSEL; AND (3) THE NUMBER AND THE NATURE OF THE OFFENSES CHARGED AGAINST HIM WERE SUCH AS TO MAKE IT IMPOSSIBLE FOR A 21-YEAR OLD DEFENDANT WITH ONLY SIX YEARS OF FORMAL EDUCATION AND LIMITED PREVIOUS CRIMINAL EXPERIENCE TO HANDLE HIS CASE WITHOUT BENEFIT OF COUNSEL.

A. The history of the development of the right to counsel in state cases is set forth at length in Edward S. Corwin's "The Constitution of the United States of America", prepared by the Legislative Reference Service of the Library of Congress (1953) on pages 1098-1109. It need not be

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mitted to continue interrogation until a confession is obtained, the Court quoted with approval from the *dissenting* opinion in *Turner*.

In Commonwealth v. *Johnson*, 365 Pa. 203, 74 A. 2d 144 (1950), the Pennsylvania Supreme Court, in the case of Turner's co-defendant, sustained the use of the very confession invalidated by this Court, as well as the use of Johnson's own confession, procured under similar circumstances and at the same time. This Court, relying on reversed *Turner*, Per Curiam, *Johnson* v. *Commonwealth*, 340 U.S. 881 (1950).

Thereafter, in two cases in which certiorari was denied by this Court, the Pennsylvania Superior Court, in refusing relief, relied upon Mr. Justice Jackson's dissenting opinion in *Turner*: *Com. ex rel. Master* v. *Baldi*, 166 Pa. Super. 413, 72 A. 2d 150 (1950), cert. denied, 340 U.S. 866; *Com. ex rel. Baerchus* v. *Burke*, 172 Pa. Super. 400, 94 A. 2d 87 (1953); *cert. denied*, 345 U.S. 966.

repeated here. But we do think that clarity in the understanding of the limits of the constitutional right to counsel can be promoted by classification of state cases into three categories: (1) cases involving the right to be *advised* of one's right to counsel; (2) cases involving affirmative *interference* by the state with the right to counsel; (3) cases involving the right to the *appointment* of counsel. Unfortunately, these three separate aspects of the matter have all too frequently not been kept separate. But cf. *Chandler v. Fretag*, 348 U.S. 3 (1954), at 9. This case involves the first and third aspects of the right to counsel. It involves both the failure of the trial court to advise petitioner of his right to counsel and the question of to what extent that right existed, that is, whether it included the right to have counsel appointed.

It had been thought until *Bute* v. *Illinois*, 333 U.S. 640 (1947) that the Fourteenth Amendment due process clause required that all defendants in all state criminal prosecutions be advised that they had a right to counsel. 46 *Columbia Law Review* 647, 648 (1946). So, at any rate, was the actual holding of this Court in *Rice* v. *Olson*, 324 U.S. 786 (1945), for the pleadings there raised only the question of failure to advise a defendant in a state criminal case of his right to counsel. While the language used by the Court in its opinion goes beyond this narrow problem, the holding could only have been as broad as the issue presented. Hence this Court must have held that advice as to the existence of the right to counsel was an essential element of due process. But in the *Bute* case, this Court cast doubt on the matter by holding that in the face of the record as presented, the failure to advise of the right to counsel, or to inquire into petitioner's desire for counsel, did not violate due process. In that case, however, the trial court had explained to the defendant the consequences of his guilty plea. The only reason upon which this Court

based its sanctioning of the procedure below was that in the circumstances of that case, there was no constitutional right to counsel. Obviously where there is no constitutional right to assistance of counsel, there is no duty to advise the defendant of its existence. Nor did the record show in that case that petitioner was ignorant of his right to counsel. Hence, the rule to be deduced would seem to be that a trial court must advise defendant in a state criminal case of his right to counsel such as it is, in a case in which a defendant is unaware that he has a right to counsel.

Anything other than such an analysis of the *Bute* and *Rice* decisions would result in an anomaly: that a defendant ignorant of the existence of the right to counsel could be sentenced for a crime upon a guilty plea whose consequences have never been explained to him by either counsel or the court. Where consequences are explained, inevitably failure to request counsel when petitioner knew of his right to counsel must be construed as a waiver of such right. *Carter* v. *Illinois*, 329 U.S. 173 (1946). Where petitioner does not know of his right to counsel, it could hardly be contended that he intelligently waived his right to counsel despite the explanation by the court of the consequences of the guilty plea. *Gibbs* v. *Burke*, 337 U.S. 773, 780 (1949). For a defendant might not realize that he would have a right to counsel were he to plead innocent, and even an explanation of the consequences of a guilty plea could not properly take the place of the careful advice by an attorney of the consequences when weighed against the possible advantage of a plea of innocent. *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948).

The question therefore arises as the extent of the right to counsel in the case at bar. We second the comments of Corwin that this Court's consideration of each non-capital right to counsel case on a case by case basis is not "very

reassuring." *Op. Cit., supra* at page 1108. Of course, as a practical matter, this Court cannot lay down any mathematical formula to cover the multitude of possible violations of the right which may arise from case to case with myriads of variables. But we urge that this Court adopt a rule which will cover a substantial number of cases in which confusion still reigns. Our suggested formula is just this: that non-capital cases in which the possible punishment is life imprisonment without possibility of parole should be treated precisely as are capital cases; that in such cases the right to counsel is absolute;[4] that the degree of prejudice need not be assessed, nor the circumstances of the individual case. For in either case the possibility that the defendant faces is that the state will take his life. In a capital case, his life is to be taken in one fell swoop; in a life imprisonment case, his life is forfeited to the state too. There seems to us to be no reason for a difference in rule simply because a man forfeits his life on a day to day basis—on the installment plan as it were—instead of in one moment of high tragedy. It is common knowledge that most of those convicts who have had death sentences commuted to life imprisonment feel that they would have been better off had they been executed. Surely, life imprisonment is not worth living. To condemn a man to a living death in prison for the rest of his life is equally as serious as to execute a man. Cf. *Williams* v. *New York*, 337 U.S. 241 (1949).

Indeed, we suggest that were a statute passed requiring an absolute right to counsel in capital cases, but a flexible standard in non-capital cases where life may be forfeit too, such a statute would present a close question of whether it violated the equal protection of the laws. It

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[4] *Tomkins* v. *Missouri*, 323 U.S. 485 (1945); *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *Hawk* v. *Olson*, 326 U.S. 271 (1945); see *Uveges* v. *Pennsylvania*, 335 U.S. 437, 440-1 (1948).

could well be argued that a discrimination based solely upon quick execution as against a living death was arbitrary and unreasonable. In formulating a constitutional rule of due process, it would seem best to avoid raising constitutional difficulties involving other constitutional provisions. Cf. *Rumely* v. *United States*, 345 U.S. 41 (1953).

We can draw little comfort for the proposition above, however, from the past decisions of this Court. Indeed, in *Quicksall* v. *Michigan*, 339 U.S. 660 (1950), this Court found that there was no absolute right to have counsel appointed in a non-capital case involving life imprisonment. But the contention made above was not suggested to this Court in the arguments of counsel, nor passed upon by this Court. *Semble*, *Massey* v. *Moore*, 348 U.S. 105 (1954). Nor does it appear in either case that the possibility of parole was absent, as it was here. However, we do point out that the four dissenters in the *Bute* case felt that *any* criminal case involving a serious charge requires the same protection of the right to counsel as is found in capital cases. Said the dissenters:

> "Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself.
>
> * * * But to draw the line between this case and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel. Yet it is the *need* for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair. And the need for counsel, even by *Betts* v. *Brady* standards, is not determined by the complexities of the individual case or the ability of the particular person who stands as an accused before the court. That need is measured by the *nature* of the

> *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law. As *Powell* v. *Alabama*, 287 U.S. 45, . . . indicates, the need for counsel in capital cases is great even though the defendant is an intelligent and educated layman. The need is equally as great when one stands accused of the serious charge confronting Bute." 333 U.S. at 681, 682. (Italics the Court's).

In the *Bute* case, the maximum penalty was 20 years. It was not a life sentence. Yet four members of this Court felt that even then there must be an absolute right to counsel. We urge that as a minimum, the same protection of the absolute right to counsel must extend to cases which are capital in the sense that life is forfeited to the state by life imprisonment. There is no reason in law or justice why the same protection should not extend. A trial procedurally unfair as to one facing death is not fair as to one facing life imprisonment.

We must admit, however, that this Court need not go so far as suggested above, in order to decide this case favorably to petitioner, for it is clear even under the narrow tests discussed below that the right to counsel has been denied under the facts of this case. We do urge, however, that the above proposition is one rule of thumb which should be laid down not only to ease the task of courts and attorneys and to bring more clarity into the law, but in order to do full justice, to insure that due process is preserved. There is no reason to discriminate against those facing life imprisonment in order to give them less procedural due process than is afforded the man who faces execution. What's fair is fair!

B. It is clear, in any event, that this petitioner was denied his right to counsel under the decision of this Court in *Ureges* v. *Pennsylvania*, 335 U.S. 437 (1948). In the *Ureges* case, this Court held that the right of counsel had

been denied in a case on all fours with the case at bar—the only difference being that ours is a stronger case. The Court there reviewed a denial by the Supreme Court of Pennsylvania of a petition to appeal from a judgment of the Superior Court which affirmed dismissal of a petition for habeas corpus. We quote below—in its entirety—this Court's summary of the allegations of the petition for habeas corpus, and quote in a parellel column the allegations in the case at bar.

Uveges	Herman
1. "On October 27, 1954, petitioner Uveges, a youth seventeen years of age, was faced with four district attorney's indictments charging four separate burglaries." (*Id.* at 438-9)	1. "At the time of sentence, Relator was 21 years of age and of limited educational background, having completed only six years of elementary school. [Note: not denied. (Tr. 2)] * * * The charges against Relator, though contained in eight indictments, in fact involved 27 separate offenses under which the maximum possible sentences would total 315 years in the penitentiary." (Tr. 2-3). [Note: admitted (Tr. 6)]
2. "Upon his plea of guilty to these indictments, Uveges was sentenced . . . to from five to ten years on each indictment, the sentences to run consecutively." (*Id.* at 439)	2. "The said sentences impose upon Defendant a total imprisonment of a minimum of 17½ years . . . and a maximum of 35 years. . . ." (Tr. 2)
3. " . . . petitioner alleged that he was not informed of his right to counsel nor was	3. "Relator did not know that he had a right to be represented by court-ap-

counsel offered him at any time during the period between arrest and conviction." (*Ibid.*)

pointed counsel and was never so advised by the court, the prosecuting attorney, or any other court official." (Tr. 2) [Note: no contention here that Herman was ever offered counsel.]

4. "He also alleged that frightened by threats of dire consequence if he dared to stand trial, relator pleaded guilty under the direction of an assistant district attorney. . . .' We disregard this last allegation because it was not presented to the Supreme Court of Pennsylvania in the petition for allowance of appeal." (*Ibid.*)

4. "Relator was questioned off and on over this 72-hour period by the State Police and during the questioning the safety of his wife and daughter were threatened. (c) At one stage in the questioning, Relator was assaulted by State Trooper H. M. Jaynes, who grabbed him by the neck and threatened to choke him if he did not confess." (Tr. 4) [Note: these allegations—as well as all the others mentioned here—were presented to the Supreme Court of Pennsylvania in summary form in the petition for allowance of appeal. (Tr. 28-9.)]

5. "The Superior Court of Pennsylvania affirmed. . ., noting that Uveges had been arrested once before for burglary and confined in a reformatory for ten months." (*Ibid.*)

5. "Relator's previous experience in criminal court had been confined to the entering of pleas of guilty in 1943 to charges of Burglary, Larceny and Forgery, for which offenses he received a sentence of 6-12 months in the County Jail." (Tr. 2) [Noted by Superior Court: see Tr. 24-25]

6. Requirement of counsel might have been dispensed with had court "conscientiously . . . undertaken to perform the functions ordinarily entrusted to counsel." (*Id.* at 442)	6. No protection of defendant's rights at all; summary sentence. (Tr. 10-18)
7. Maximum possible sentence: 80 years. (*Id.* at 442)	7. Maximum possible sentence: 315 years (Tr. 2-3).

This Court concluded that on the basis of the facts in Uveges, due process of law had been violated by failure to appoint counsel for defendant. Said Mr. Justice Reed, speaking for the Court:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. * * * Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. * * * Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair; the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only

a waiver of counsel, understandingly made, justifies trial without counsel.

"The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies as indicated in the preceding paragraph.

"Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing." 325 U.S. at 440-442 (footnotes omitted).

We note in passing that the three dissenting Justices in *Uveges* dissented not on the merits but on the procedural ground that the issue had not been properly presented to

the Pennsylvania courts. There is no question in the case at bar as to proper raising of the issues.

We need not belabor the obvious by reiterating the point that the facts in *Uveges* and in the present case are virtually identical. Under either of the two theories set forth by Mr. Justice Reed, clearly Petitioner here was deprived of due process of law by failure to advise him of his right to have court-appointed counsel. Accord, *Palmer* v. *Ashe*, 342 U.S. 134 (1951).

The Common Pleas Court and the Superior Court both referred to the fact that defendant had previous criminal experience (Tr. 20, 24). But this was considered immaterial by this Court in *Uveges* (see supra p. 16). Here, moreover, it is alleged that "Relator had no knowledge of formal criminal proceedings . . ." (Tr. 2).

In *Walker* v. *Johnston*, 312 U.S. 275 (1941), petitioner claimed that he hadn't known of his right to counsel, though he was an escaped convict from the state penitentiary. While the government denied that he had lacked such knowledge, this Court held that "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record he has the right to be heard." *Id.* at 287. Lest it be thought that the rule of *Walker* was due to its being a federal case, we point out that the rule has been applied just as strictly, if not more so, in state cases. In *Gibbs* v. *Burke*, 337 U.S. 773, a state case, the petitioner had a record of eight convictions and nine acquittals, discharges, and no true bills. *Id.* at 775. Yet the petitioner alleged that he had not known of his right to counsel, and this Court held that his failure to request counsel when he did not know of his right thereto was not a waiver. *Id.* at 780. In the case at bar, it is peculiarly difficult to understand how the defendant could have known that he had the right to have counsel appointed when the

courts of Pennsylvania have held that he had no such right. Is petitioner to be charged with more knowledge of the law than the Justices of the Pennsylvania appellate courts? Only a hearing could determine defendant's knowledge of his rights.

As this Court said in *Wade* v. *Mayo*, 334 U.S. 672 (1947):

> "It appears that petitioner, at the time of his trial . . . was 18 years old, and though not wholly a stranger to the Court Room, having beeen convicted of prior offenses, was still an inexperienced youth unfamiliar with court procedure, and not capable of adequately representing himself . . ."
>
> "There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process under the Fourteenth Amendment."

The record herein amply demonstrates Herman's inability to handle his case without counsel. Twenty-seven charges were brought against him, many of them being offenses of a technical nature. For example, in No. 59 November Sessions, 1945, the defendant was charged with the commission of seven forgeries. All of the cases involved the signing of his wife's name to checks written on her account and honored by the bank. (Tr. 13). No third person was defrauded. The Commonwealth offered in evidence checks supporting six of the seven cases, but on the third count, charging forgery of a $15.00 check on June 3, 1945, the check was not produced, or at any rate

does not appear in the record in criminal court. It being apparent from the Commonwealth's evidence that no person other than defendant's wife was defrauded, it is clear that, on trial, no case could have been made out, since her testimony would probably not have been admissible under the provisions of the Pennsylvania Act of May 23, 1887, P. L. 158, as amended (19 P.S. 683), which bars a wife from testifying against her husband. It is also clear that the seven forgery charges involved substantial questions as to whether Herman had authority to sign his wife's name as her agent, whether the bank account was her sole and separate property, etc. No layman, and particularly not a 21 year old defendant with a sixth grade education, could be expected to see that such legal questions and defenses were involved, much less to pass intelligently on these technical questions. Yet Herman's uninformed plea was accepted and sentences of 2½ to 5 years were imposed on each count, to run concurrently with each other, but consecutively with the sentences on other indictments.

A further indication of the complexity of the legal issues involved is presented by the indictment in No. 58 November Session, 1945 (Tr. 12-13). In the First Count of this indictment, defendant was charged with having forged the name of the payee to a check in the amount of $28.28. (Tr. 12). The Plea Notes show the following in reference to the Second Count of the same indictment:

F. J. Doktor, Assistant District Attorney:

> "The second count charges this Defendant with false pretense, involving the same set of circumstances. He tried to defraud one Wilner, with whom he attempted to cash the check." (Tr. 13)

On this evidence, the offense of False Pretense was not made out, although Defendant might have been guilty of

an attempt to commit the offense. Yet on evidence which at most sustains the commission of an attempt, a misdemeanor, Defendant was sentenced to the Penitentiary for 2½-5 years.

It should be noted that the eight indictments, containing 27 counts, on their face indicated the presence in the case of technical questions which an uneducated layman could not be expected to cope with adequately. As this Court put it:

> "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the state exacts for the offense which they in fact and in law committed." *Tomkins* v. *Missouri*, 323 U.S. 485, 489 (1945).

In addition, also before the Court was defendant's agreement to plead to *three* offenses. Yet nowhere in the record does it appear that the Court concerned itself in any way with this multiplication of charges. Nor in his Answer does the District Attorney allege that the indictments were explained to the defendant. As this Court stated in *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941) notice of the true nature of the charge is ". . . the first and most universally recognized requirement of due process . . ."

In the *Uveges* case, cited supra, Mr. Justice Reed referred to the fact that the requirement of counsel might have been dispensed with in that case if the court had informed the defendant of his rights and ". . . conscientiously had undertaken to perform the functions ordinarily entrusted to counsel . . ." (at p. 442). Accord: *Gibbs* v. *Burke*, supra; *Carter* v. *Illinois*, supra. This duty was completely disregarded by the trial court in this case. The Court well knew that this defendant was only 21 years of age (Tr. 13). The Judge knew also that this defendant

had previously entered a guilty plea. (*Ibid.*) He was aware of the seriousness of the offenses charged against the defendant, and that technical questions were necessarily involved. He knew, or should have known, that defendant was of limited educational background, and had agreed, following arrest, to plead to three charges, yet was now before him 27 counts. All of these factors should have indicated to the Judge that Herman needed counsel, or, at the minimum, the conscientious and careful scrutiny of the case which was required to prevent this defendant from being overreached. Yet, notwithstanding these facts, the court proceeded to sentence this defendant, without counsel, without informing him of his rights, without even telling him of the potential enormous sentence he was facing and with no effort to assure himself that each of the 27 charges was properly brought.

One additional factor present in this case clearly indicates the prejudice to this defendant of his entry of plea without counsel. Defendant's pleas resulted from the fact that he had previously confessed to certain of the charges. Had he been advised by counsel, he would have known that the previous confession could have been repudiated and the question of whether or not it was voluntarily made submitted to the jury. Ignorant of this fact, the defendant by signing the pleas ratified what he felt he had done irrevocably at an earlier date.

This record, then, indicates that Defendant's guilty plea, made without counsel, resulted in the denial of his rights to due process of law. The ruling of the Pennsylvania courts to the contrary is not binding upon this Court, which may determine for itself whether a federal right had been denied from an inspection of the record. *Powell* v. *Alabama*, 287 U.S. 45 (1932).

Viewing this case as a whole, with regard to substance as well as form, it is clear that Petitioner stated a cause

of action. If Petitioner's averments are true, as must be assumed in this proceeding, there is no doubt that he was deprived of his federal constitutional rights.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1955

NO. 45

COMMONWEALTH OF PENNSYLVANIA,
Ex Rel. STEPHEN J. HERMAN,
Petitioner

vs.

DR. JOHN W. CLAUDY, Warden

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District.

BRIEF OF DISTRICT ATTORNEY OF WASHINGTON COUNTY, PENNSYLVANIA

WRAY G. ZELT,
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Washington County,
Pennsylvania,
HAROLD V. FERGUS,
First Ass't. District Attorney,
JOHN F. RONEY,
Assistant District Attorney,
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QUESTIONS PRESENTED FOR REVIEW

(1) Was it proper for the lower court to dismiss the Writ of habeas corpus without a hearing and was the Appellate Court justified in sustaining the lower court's decision?

(2) Was it a violation of due process of law of the Fourteenth Amendment when the sentencing judge failed to advise the defendant that he had a right to have the court appoint counsel, and was the judge required to appoint counsel for him?

(3) Is the petitioner guilty of laches by filing his petition for writ of habeas corpus some eight and one-half years after his sentence?

STATEMENT OF THE CASE

The District Attorney does not agree with some of the statements made concerning the facts of this case.

There is nothing in the record to show that the petitioner was assaulted by the police officers. This allegation made in the petition was denied by this office. Likewise, neither was the safety of the petitioner or his wife and children threatened by anyone. This was also denied by this office. The charge that the police officer grabbed the petitioner during the questioning was also denied by this office.

The statement that no relatives or friends appeared to give him advice was also denied by this office.

The charge that the petitioner on October 26, 1945 when brought before the court was directed by the Assistant District Attorney to sign pleas to eight indictments with the statement by the Assistant District Attorney that the petitioner was to "sign your name and forget it" was denied by this office. There is nothing in the record of the sentencing judge that this occurred.

The statement that the petitioner was unfamiliar with courtroom procedure, did not know he had a right to have counsel appointed for him, that no one informed him that by pleading he could be sentenced for a period of 315 years was denied by this office.

ARGUMENT

I. The confession obtained by the police officers from the defendant was not obtained by any threats to the defendant or to members of his family and neither was there any physical abuse committed by the police officers upon the defendant, the confession having been obtained properly, and also the defendant having an opportunity to inform the sentencing judge of these facts, failed to do so; therefore, it is proper to assume that these statements are false and without merit, and, therefore, the confession should be sustained.

There is no definite rule of law in Pennsylvania as to how long a defendant may be detained for questioning or investigation. If the petitioner was detained for 72 hours in the local jail it is the contention of the District Attorney that the detention was not for an unreasonable length of time.

The Pennsylvania courts have ruled on this question several times.

In the case of *Commonwealth of Pennsylvania vs. Shupp*, 365 Pa. 439, the defendant was not given a preliminary hearing until fifteen days after his arrest. The Supreme Court of Pennsylvania said:

> "The defendant was lawfully in prison charged with an unbailable crime. There is no

prescribed time within which a preliminary hearing must be held: Commonwealth vs. Agoston, 364 Pa. 464, certiorari denied U. S. Sup. Court, Oct. 9, 1950; Lyons v. Oklahoma, 322 U. S. 596; and in any event the delay, if it may be so characterized, in holding this hearing was, under the facts and circumstances in this case immaterial."

In the case of *Com. ex rel. Lockoski vs. Claudy,* 172 Pa. Superior Court 330 (a case from Washington County), the defendant was detained for seven days in the jail. On a writ of Habeas Corpus the Appellate Court sustained the lower court's dismissal of the writ by stating as follows:

"When one is lawfully in prison after his arrest there is no prescribed time within which a preliminary hearing must be held."

In the case of *Commonwealth of Pennsylvania vs. Shupp,* 365 Pennsylvania 439, 75 Atl. 2nd 587, involving a murder case, the prisoner was held in jail for 15 days before a preliminary hearing. The Court held:

"This was not an unreasonable length of time and therefore not a denial of due process of law."

In the case of *Commonwealth of Pennsylvania vs. Agoston,* 364 Pa. 464, where the prisoner was held for 4 days in jail before a hearing was held, the Court held this was not an unreasonable length of time to detain the petitioner.

After an examination of the cases from Pennsylvania it is the contention of the District Attorney that

the petitioner's constitutional rights were not violated by being confined in jail for 72 hours.

The mere fact that the petition alleges that the petitioner was illegally detained, that he was questioned at length and that threats were made to the petitioner as well as members of his family does not mean that the lower courts should ipso facto grant a hearing. All of the above allegations were denied by the answer of the District Attorney.

If the above allegations were true, the petitioner should have advised the Court or the District Attorney of the mistreatment received from the police officers. The petitioner was questioned on September 8, 1945 and one month and eighteen days after was called for sentence, namely on October 26, 1945. As the sentencing Judge states in his opinion,

> "While in open court where he entered his pleas he does not claim that he was influenced by any threats or undue influence or that he had been subjected to such during the one month and eighteen days intervening between his commitment and the time he appeared in court."

It is almost eight and one-half years later that the above charges are made by the petitioner.

As the trial Judge stated:

> "The defendant now claims that he was not guilty of any but one of the charges charged. He seeks now, almost eight years after entering his pleas of guilty and being sentenced to show his

innocence and contradict all of the records regarding the crimes in which he admitted he was involved. This is so unreasonable it requires no comment."

In the case at bar the Superior Court stated as follows:

"Since the lower court dismissed the petition without a hearing, the facts alleged in the petition, if properly and sufficiently averred and unless contradicted by the record itself must be accepted as true. The conclusions contained in it need not be."

Counsel for petitioner argues that since facts are alleged in the petition, a hearing must be held. Since our answer contradicted the allegations in the petition, the lower court was not required to grant a hearing. This contention was sustained by the Superior Court.

II. The failure of the sentencing judge to advise the defendant of his right to have the court appoint counsel for him in a case of this nature was not a violation of the due process clause of the Fourteenth Amendment.

A review of some of the cases in our appellate courts hold as follows:

In the case of *Commonwealth of Pennsylvania ex rel. Popovich vs. Claudy*, 170 Pa. Superior Court 482, the Court states as follows:

Relator was 17 years and 8 months old. Relator relies solely on his youth and alleged inexperience to establish a denial of due process in the absence of counsel at the time he pleaded guilty to charges of burglary and attempted burglary. He attempted to create an issue of federal due process by adopting in his petition some of the language appearing in the *Uveges v. Pa.* case:

> "Relator makes the contention frequently made by those seeking discharge on writ of habeas corpus possibly resulting from oversimplification of the Uveges case—that lack of counsel, if associated with one or more of the facts above mentioned, constitutes per se denial of due process of law.
>
> "To invalidate a plea of guilty in non-capital cases by reason of denial of due process arising from failure to provide a prisoner with counsel by the courts of this commonwealth, the prisoner must establish that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement citing many U. S. cases.
>
> "Again in Gallegos v. Nebrosha, 342 U. S. 55, Justice Reed speaking for the Court said, 'The Federal constitution does not command a state court to furnish defendants counsel as a matter of course as is required by the Sixth Amendment in Federal prosecutions. Lack of counsel at state non-capital trials denies federal constitutional protec-

tion only when the absence results in a denial to accused of the essentials of justice."

In the case at bar, the Superior Court held as follows:

"A careful reading of the record will indicate that there was no unfairness on the part of the Court or the District Attorney."

The Court further states that:

"The law to be applied in this case was set forth by this court in Com. ex rel. Reggie v. Burke, 170 Pa. Superior Ct. 647, 649, 90 A. 2d 385 (1952), as follows:

"The failure to provide counsel when none is requested or to advise a defendant that counsel will be assigned him upon request does not constitute, ipso facto, a denial of due process or other violation of a defendant's constitutional rights in noncapital cases.

"Both federal and state courts have said that, to invalidate a plea of guilty in noncapital cases by reason of denial of due process arising from failure to provide a prisoner with counsel by the courts of this Commonwealth, the prisoner must establish that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement. (Cases cited) In the absence of such ingredient of unfairness, the question of waiver of the right to counsel, understandingly made, does not require consideration."

See also *Com. ex rel Popovich v. Claudy,* 170 Pa. Superior Ct. 482, 87 A. 2d 489 (1952); *Com. ex rel. Johnson v. Burke,* 174 Pa. Superior Ct. 119, 100 A. 2d 125 (1953).

Whether there is "an ingredient of unfairness" is a determination to be made on the basis of the facts of the individual case; *Uveges v. Pennsylvania,* 335 U. S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948).

In the recent case of *Com. ex rel. Swieczkowski v. Burke,* 173 Pa. Superior Ct. 363, 366, 98 A. 2d 229 (1953) this Court said:

> "Youth, lack of education, inexperience with the intricacies of criminal procedure, improper conduct on the part of the court or prosecuting officials and the complicated nature of the offense charged may, in some combination, constitute the 'ingredient of unfairness' which renders the absence of counsel at sentencing a denial of due process. Uveges v. Pennsylvania, 335 U. S. 437, 441, 69 S. Ct. 184, 93 L. Ed. 127."

The Court asked him where he had been working since he was paroled in the former case and, after the Court referred to his running away from his work while he was on parole, asked him, "Will you explain to me why the Court should extend any leniency to you?" The court asked him whether he had committed numerous burglaries and forgeries and various felonies and he replied, "Yes, sir." The Court inquired for the day of commitment, and sentenced with care. The Court's discussion of the case with the defendant is recorded over three pages of the printed record. It

shows that the defendant was not only given opportunity but was encouraged to say anything to the Court which he felt would be helpful to his cause. At no time did the defendant suggest that he desired counsel.

In the case of *Uveges v. Pennsylvania*, argued November 15 and 16, 1948, decided December 13, 1948, the majority of the Judges of this Honorable Court held as follows:

> Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See Bute v. Illinois, 333 US 640, dissent, 677-679, 92 L ed 986, 1006, 1007, 68 S. Ct. 763. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady, 316 US 455, 462, 86 L ed 1595, 1601, 62 S. Ct. 1252. Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal as-

sistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel. The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies as indicated in the preceding paragraph. Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an adviser to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea.

The dissenting opinion delivered by Justice Frankfurter (four justices) held that:

1. The only matter before us is disallowance of the appeal to the Pennsylvania State Supreme Court.

At best, however, intervention by this court in the criminal process of state is delicate business. It should not be indulged in unless no reasonable doubt is left that a state denies or has refused to exercise, means of correcting a claimed infraction of the U. S. constitution.

Intervention by this Court in the administration of the criminal justice of a state has all the disadvantages of interference from without.

In the case of *Bute v. Illinois*, argued February 12, 1948, decided April 19, 1948, this Honorable Court held as follows:

> The issue here is whether or not each state sentence shall be held to have been imposed in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States because each common law record shows that the petitioner appeared "in his own proper person" and does not show that the Court inquired as to the petitioner's desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him to assist him in his defense, or that such counsel was offered or assigned to him. We hold that such a silence in the respective records does not suffice to invalidate the sentences. We hold further that, in the absence of any showing beyond that in these records, the due process clause of the Fourteenth Amendment did not require the Illinois court to make the inquiries or the offer or assignment of

counsel now claimed to have been the right of the petitioner.

The cases turn upon the meaning of "due process of law" under the Fourteenth Amendment in relation to the assistance of counsel for the defense of the accused in state criminal trials such as these. In Powell v. Alabama, 287 US 45, 77 L ed 158, 53 S. Ct. 55, 84 ALR 527, this Court granted relief in a group of capital cases which demonstrated the essential need for applying the full force of the Fourteenth Amendment to the invalidation of purportedly valid judgments rendered in a state court under the circumstances there shown. Those and other less extreme cases have well illustrated the kind of service to the cause of justice which can be rendered by this Court in thus giving effect to the Fourteenth Amendment.

"The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law.

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may

disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence."

Holden v. Hardy, 169 U. S. 366, 389, 390, 42 L. Ed. 780, 790, 18 S. Ct. 383.

The present case, on the other hand, illustrates equally well the kind of judgments by a state court that should not be invalidated as lacking in the due process of law required by the Fourteenth Amendment. This is so, although the procedure followed, in 1938, by the state court in the instant cases, as to counsel for the accused might not have satisfied the practice then required of a federal court in the case of comparable federal crimes. The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the federal process of law as prescribed for the federal courts in comparable federal cases. It says merely, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

III. The records in the office of the Clerk of Courts of Washington County, Pennsylvania concerning the hearing before the local alderman discloses that the petitioner was present at a hearing before the local alderman, did testify and admitted the crimes charged against him and entered an oral plea of guilty to the various charges entered against him and the record of the sentencing judge discloses that the Assistant District Attorney explained in detail to the court the nature of the charges and further discloses that the defendant was given an opportunity by the Assistant District Attorney as well as by the sentencing judge as to whether or not this petitioner had anything to state to the court about the cases. Therefore, there being no violation of the due process clause the conviction should be sustained.

The records in the office of the Clerk of Courts do not disclose that the petitioner was refused information concerning the charges, on the contrary the transcripts of the alderman disclose that the charges were read to the petitioner who after hearing the charges entered his oral pleas of guilty.

An examination of the record taken before the sentencing judge states that the indictments were read to the trial judge in the presence of the petitioner and at that time no request was made by the petitioner as to any information he desired concerning the charges.

As the Superior Court stated this petitioner had two years prior to the present charges been involved

with the crimes of burglary, larceny and forging in the Washington County jail for a period of six to twelve months. Having served a sentence the allegation by the petitioner that he had no previous court experience is without merit.

It is submitted that the petitioner cannot now contradict a record which has been on file in the Court House for over eight years by the writ of habeas corpus.

As was ably stated by the Superior Court, "A record was made of the hearing, the assistant District Attorney advised the Court that the defendant had entered a plea of guilty to the charges."

A careful reading of the record will indicate that there was no unfairness on the part of the Court or the District Attorney.

The Commonwealth contends that a judgment of conviction by a court carried with it a presumption of regularity. It further contends that the longer the judgment of conviction stands, the stronger the presumption of regularity becomes. In the case of *Commonwealth ex rel. Howard, Appellant v. Claudy,* 175 Pa. Superior Court, page 1, the Court states as follows:

> "Equally important in habeas corpus proceedings is the presumption of regularity which a judgment of conviction carries with it: Commonwealth ex rel. Kaylor v. Ashe, 167 Pa. Superior Ct. 263, 267, 74 A. 2d 769. Our courts have never said that this presumption is conclusive, but when

one undertakes to overcome it, his evidence should be clear and convincing. Furthermore, the longer the judgment stands, the stronger the presumption becomes."

IV. The petitioner is guilty of laches by filing his petition for a writ of habeas corpus about eight and one half years after his sentence.

The above question for argument was presented in the brief of the District Attorney to the Pennsylvania Superior Court but the issue was not decided by the court.

In the case of *Commonwealth ex rel. Quinn v. Smith, Warden*, 144 Pa. Superior Court 160, where a petition for Writ of Habeas Corpus was filed some fifteen years after sentence and over ten and one-half years after his release on parole, the Court held as follows:

> "We are of the opinion that, by reason of his subsequent criminal conduct, it is now too late to enter upon a full and proper investigation into the matters alleged in his petition and arrive at a just determination of their truth or falsity."

In the case of *Palmer v. Ashe* decided by this Court on November 5, 1951, and reported in 342 U. S. 134, the petitioner presented his petition for Writ of Habeas Corpus some eighteen years after his plea of guilty.

Justice Black speaking for this Court held that the prisoner was entitled to a judicial hearing.

The minority opinion (four justices) held as follows:

> "I think it an allowable judgment for the Pennsylvania courts to conclude that petitioner's allegations, made eighteen years after trial were improbable in the light of the matter of record that probable cause did not exist for his discharge, and that the necessity of a hearing was not indicated. The courts had a right to assume in absence of allegations or record to the contrary, that petitioner was a mentally competent young man of twenty-one years; and that his contention made eighteen years later, that he had pleaded guilty to crimes other than he thought he was pleading to was a bit hard to believe, especially in the absence of an allegation that he did not commit the offense charged in the indictments. To me it appears plain that the record on the whole is against the petitioner. Under the practice of Pennsylvania petitioner is entitled to the Writ of Habeas Corpus only when the court is satisfied there is probable cause for it to issue. On the record it was permissible for the courts of Pennsylvania to conclude that there was no probable cause shown why the writ should issue and that a hearing was not necessary."

In *Commonwealth ex rel. Uhler v. Burke*, 172 Pa. Superior Court 108, decided in 1952 the Court held that the petitioner, who some eighteen years from the

time of his commitment presented his petition for Writ of Habeas Corpus, had failed to establish any denial of due process or other infringement of his constitutional rights.

In conclusion it is submitted that the petitioner has failed to state a cause of action and therefore the judgment below should be sustained.

Respectfully submitted,

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